

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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:  
ANGEL HERNANDEZ, :  
:  
Plaintiff, : 18-CV-09035 (JPO)  
:  
v. :  
:  
THE OFFICE OF THE COMMISSIONER OF : 500 Pearl Street  
BASEBALL, *et al.*, : New York, New York  
:  
Defendants. : October 28, 2019  
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TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONIC CONFERENCE  
BEFORE THE HONORABLE GABRIEL W. GORENSTEIN  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 THE COURT: Hello, this is Judge Gorenstein. Who's  
2 on the line, please?

3 MR. MURPHY: Good afternoon, Your Honor. Kevin  
4 Murphy, Nick Gregg and Nick Zaita for the plaintiffs.

5 MR. LUPION: Good afternoon, Your Honor. Adam  
6 Lupion, Rachel Philion and Rachel Fischer on behalf of the  
7 defendants.

8 THE COURT: Okay. We're being recorded and we're  
9 here based upon three letters, dockets 108, 111, and 113.

10 I've read your letters and I guess I've just -- you  
11 know, there's obviously been a delay from when this first  
12 issue was raised and the plaintiff's best case on this  
13 point -- and I'm not sure it's enough to carry the day -- is  
14 that there were designations in late August.

15 So I guess I should hear from defendants as to  
16 whether those were of a different character, prior  
17 designations and what they were exactly.

18 MR. LUPION: Sure, Your Honor. This is Adam Lupion.  
19 A couple of observations, Your Honor. I think plaintiff has  
20 essentially conceded that any challenge with respect to the  
21 documents is untimely based upon their reply letter that they  
22 have submitted. The des -- confidentiality designations with  
23 respect to deposition testimony essentially followed the same  
24 designation scheme of the documents that were designated  
25 confidential. There's no different nature of confidential

1 information that's reflected in those designations.

2 But even putting that aside, we believe that the  
3 confidentiality designations with respect to the depositions  
4 would still be untimely and that is because plaintiff received  
5 those designations in August. Under the terms of the  
6 confidentiality order that Judge Oetken so ordered, and that  
7 is reflected at document 36 on the docket at paragraph 3, that  
8 paragraph 3 provides that in the event a party disagrees with  
9 a designation, the parties have to first attempt to meet and  
10 confer before presenting the dispute to Your Honor. And in  
11 the event that there is a disagreement that the party can  
12 request that the judge or the magistrate refer the document,  
13 the recording or the information to make a determination.

14 We don't have that here. Plaintiff hasn't put  
15 anything before the Court. He hasn't identified documents  
16 or -- excuse me, the deposition excerpts that he claims would  
17 be inappropriately designated. His position appears to be we  
18 have to justify all of the designations on an item-by-item  
19 basis. So there's nothing before the Court and any attempt to  
20 cure that defect now in the -- approaching November would be  
21 equally untimely as the designations with respect to the  
22 documents.

23 So that's our position on timeliness. I think our  
24 position with respect to the merits is --

25 THE COURT: Let's just hold off on that. Hold off

1 on that for a second. I just want to hear plaintiffs on the  
2 timeliness issue. And again, this is just on protective order  
3 designations, not on the filings, which I'm going to deal with  
4 separately.

5 So tell me anything you have to say about that,  
6 Mr. Murphy.

7 MR. MURPHY: They made their challenges relating to  
8 the depositions, Your Honor, on August 27th --

9 THE COURT: Challenges? You mean, designations.

10 MR. MURPHY: Designations, right. They made their  
11 designations in August -- late August of this year and we  
12 responded very quickly on September 27, 2019. And those  
13 designations of confidentiality, they sat on it for quite some  
14 time. And we believe that they designated those depositions  
15 as confidential and attorney's eyes only and so much of the  
16 depositions because we were about ready to file an amended  
17 complaint.

18 We're very timely on that issue without question.

19 THE COURT: Why is that without question? Explain  
20 that to me.

21 MR. MURPHY: Because they didn't make the  
22 designations until the end of August and then we went about  
23 the process in September of trying to have meet-and-confers to  
24 try to get to the defendants to lift those designations or at  
25 the very least come up with compelling reasons that would

1 justify keeping those aspects of the deposition confidential  
2 and under seal and they did not do that.

3 THE COURT: Okay. Well --

4 MR. MURPHY: Didn't give us any reason.

5 THE COURT: Okay. It sounds like you had your --  
6 set out your problems to them September 11th and then it's a  
7 month later and after the close of discovery before you come  
8 to me and you don't even give me any specifics. So tell me  
9 how you've met my timeliness requirement.

10 MR. MURPHY: Well, we've had several back-and-  
11 forths, Your Honor, between -- with the parties. They wanted  
12 to place the burden on us to indicate what it is about these  
13 designations that you believe are wrong when, in fact, the  
14 reasons must be compelling and they must justify it. Baseball  
15 doesn't have any competition. There is no other league that  
16 they're competing against that they need to keep their  
17 processes secret.

18 And we asked them repeatedly what is it about these  
19 designations. For instance, you know, there's several  
20 designations that have nothing to do with confidentiality, but  
21 rather embarrassing testimony that resulted including, you  
22 know, one of their executives making a statement that the  
23 reason why there are such few African-Americans going from the  
24 umpiring school through the minor leagues into the major  
25 leagues is because they all want the job tomorrow and they

1 don't want to go through all of the work to get there.

2 Now, that's been designated attorney's eyes only.

3 How is that confidential? How is that something they need to  
4 be protected other than the fact that it doesn't help them in  
5 their case against Mr. Hernandez? We asked for those I think  
6 under the rules and under the order. We're entitled to know,  
7 especially now that we're facing -- I know you said you would  
8 get to that, but we're facing summary judgment. And they  
9 won't respond, they won't give us any reasons why they've made  
10 these designations.

11 THE COURT: Okay.

12 MR. MURPHY: And we came to you after we --

13 THE COURT: I'm sorry, go ahead, Mr. Murphy. I  
14 thought you were done.

15 MR. MURPHY: We came to you -- we came to you after  
16 we couldn't resolve it with the defendants.

17 THE COURT: Well, you didn't give me much in your  
18 letter about what actually happened on September 11th and  
19 whether there was matters specific to the August designations  
20 or not. So that's a little bit of a mystery to me. I mean, I  
21 know you've had -- you're having a generic dispute about their  
22 burden to designate -- to explain their designations and so  
23 forth, but right now I can't really tell if there was a  
24 specific process about the August deposition designations.

25 MR. MURPHY: We attached the letter to you, Your

1 Honor, and we challenged whether the defendant --

2 THE COURT: You attached --

3 MR. MURPHY: -- met their burden --

4 THE COURT: You attached the letter of August 27th,  
5 the various August 27th letters. Did you attach something  
6 else? What is --

7 MR. MURPHY: I believe that we attached the  
8 September 11, 2019 letter to you.

9 THE COURT: I don't think so. That's not kind of my  
10 point, though -- it's partly my point, but hold on a second.  
11 Let me see if I can pull it up. Hold on.

12 MR. MURPHY: And that should be attached to our  
13 October 18, 2019 correspondence to you, Your Honor.

14 THE COURT: Well, I have it in front of me. Hold  
15 on. It -- oh, here. It's the last thing [indiscernible]. I  
16 mean, what -- what is the prejudice to you other than trying  
17 to deal with the filings that are coming up in summary  
18 judgment?

19 MR. MURPHY: Your Honor, the judge's practices --  
20 individual practices at this stage and one of his orders says  
21 the filing parties shall make an application to seal or treat  
22 the materials as confidential information in accordance with  
23 the court's individual rules and the governing law. And Judge  
24 Oetken lifts -- and I don't know if I'm going to pronounce it  
25 correct -- the Lugosch case, which indicates very clearly,

1 Your Honor, that at this stage unless the defendant can come  
2 up with most compelling reasons why documents should remain  
3 sealed as we come into judicial filings and judicial documents  
4 they shall be opened.

5 THE COURT: Well, you're making my --

6 MR. MURPHY: And we're there.

7 THE COURT: You're making my point, which is the  
8 problems come at the summary judgment stage, not today.

9 It's --

10 MR. MURPHY: But discovery has been completed, Your  
11 Honor.

12 THE COURT: Okay. Well, this is my point.  
13 Discovery has been completed and what we should be focusing on  
14 is filing for the summary judgment stage. So I want -- the  
15 Lugosch standard is what should be applied here and it's the  
16 one more favorable to you anyway and it should be done in the  
17 context of the summary judgment briefing.

18 So Judge Oetken's practices supersede the  
19 confidentiality order, so that should be followed. But here's  
20 what I'm going to do. I'm going to -- we're going to  
21 institute a process here so that we can get as much of this  
22 done in advance as possible. And I'm going to make clear, and  
23 if necessary I'll do a written order that says that if you  
24 were -- have to make a redacted filing because you couldn't  
25 reach agreement that the person who designated the material as



1 confidential, which a lot of it [indiscernible] the defendant  
2 is going to have the responsibility for filing the letter  
3 motion described in Judge Oetken's practices to justify the  
4 redactions that you were compelled to make by virtue of the  
5 designations and the inability to agree as part of the process  
6 we're now going to discuss.

7           So I think that really gets you everything you need.  
8 So let's talk now about the process. I think now that we've  
9 cleared the brush from the confidentiality order and we now  
10 know what we're dealing with, I think the best process is for  
11 you to the extent you can do so and we can adjust the schedule  
12 if necessary to provide to the defendants ideally, you know, a  
13 copy of the summary judgment motion. But if not that, then a  
14 listing of the particular items that you intend to include in  
15 there and any attachments. And then say to them, are you  
16 going to be making a Lugosch application on this and then  
17 we'll obviously say, yes, we can do it or, no, we can't do it.  
18 Right now you have no information on that because they've  
19 never been faced with that choice. So that -- we need a  
20 process for that and I'm happy to hear from you as to what you  
21 think is the best way to do it is.

22           MR. LUPION: Your Honor --

23           THE COURT: I'm addressing plaintiffs first, then  
24 I'll hear from --

25           MR. LUPION: All right.

1 THE COURT: -- defendants.

2 MR. MURPHY: I have Mr. Gregg on the phone and I  
3 would ask your permission that if I say anything that's not  
4 correct that he be allowed to correct me.

5 But in any event, we had this discussion. One of  
6 the things that I would like to mention to you is, I'm a guest  
7 in your courtroom and I recognize that. And so we came to you  
8 once with a motion to -- in a discovery case and the order was  
9 to go back and try harder with the other side. I did not  
10 forget that and I pick my fights.

11 And so as it relates to the designations of  
12 confidentiality I hear you loud and clear. But once discovery  
13 was over and when we received these depositions designations  
14 that's when I started to realize that this process wasn't  
15 going to work. And I did say to them that we want to use -- I  
16 believe we gave them a list of documents that we wanted to use  
17 including deposition exhibits that were attached to each and  
18 every deposition because Nick Gregg and I culled thousands and  
19 thousands of documents down to just what we thought were  
20 important and relevant. We want all access to those documents  
21 to be used in summary judgment. And I want access to  
22 everything in the depositions other than what's clearly known  
23 by attorneys as something highly personal when, you know, one  
24 deponent said that he had hearing aids. There were other  
25 instances of health issues. I'm not interested in that.

1 But the idea that baseball can keep all of the  
2 umpires' reviews from the public when that goes to the very  
3 essence of the case that my client had higher reviews and  
4 higher performance than the white umpires that were passed  
5 over repeatedly year in and year out. There's never been an  
6 African-American crew chief in the history of baseball and  
7 there's only been one Hispanic. And they have a review  
8 process and they want to keep those things confidential.

9 So we did give them a list and we did tell them what  
10 we wanted to do. I -- to be perfectly candid, Your Honor, I'm  
11 not, you know, real enamored with giving them a preview to the  
12 movie, giving them a heads up of where we're going before, you  
13 know, the date is due but, of course, I'm in the business of  
14 complying with court orders.

15 But we did this and we just --

16 THE COURT: Well, you did it in the context --

17 MR. MURPHY: -- [indiscernible] cooperation --

18 THE COURT: Okay. Well, you did it in the context  
19 of the confidentiality order and I'm taking it out of that and  
20 I'm now putting it in the context of the much tougher on them  
21 Lugosch standard.

22 So I don't think --

23 MR. MURPHY: But we didn't do what you --

24 THE COURT: I don't -- I don't think we should look  
25 to the past. I think we should look to how we're going to

1 solve the problem and I'm sure that --

2 MR. MURPHY: All right.

3 THE COURT: -- my involvement will be a lot simpler.

4 So there's a couple ways to do it. I think the more  
5 efficient way is for you to say, you know, if you're literally  
6 planning to attach every deposition then you can say that.  
7 And if you're saying you're going to redact what these very  
8 personal things are, you should specify what you're not going  
9 to include and you're not arguing about; is there some other  
10 documents you attempt to attach you should specifically  
11 identify for them. And then they should respond saying, we  
12 will make the Lugosch application, or, we will not, and there  
13 should be a conversation about it and I don't think you're  
14 tipping very much. I'm not asking you to divulge the  
15 arguments in your brief. I don't think it's a big secret on  
16 that you might -- that you might find of interest particular  
17 documents that are their documents that they've produced to  
18 you. So I don't think there's any tipping-of-the-hand issue  
19 that's serious here at all.

20 So I think that's the best way to do it. I think  
21 that after the defendants see whatever it is you say you're  
22 attaching. You know, certainly ultimately they need to inform  
23 you whether they'll be making a Lugosch application. And if  
24 they're not they should tell you that. And if they say that  
25 you're not then you'll be able to include it in a publicly-

1 filed document.

2           So that was the thought on my mind. I mean,  
3 obviously I don't know if there's any material like this, but  
4 if there was material -- actually, let me strike that. I  
5 don't want to deal with the merits of any of the -- of your  
6 application. I think that's something the two of you should  
7 deal with separately. I'm not sure I've ever going to get  
8 involved because I think it's something Judge Oetken will  
9 ultimately decide.

10           But if there's a question about revealing, you know,  
11 performance evaluations of particular individuals which does,  
12 you know, implicate some privacy interest there may be ways  
13 around it which you two should discuss, like giving --  
14 identifying numbers for the particular people involved, along  
15 with, you know, their races and age and anything else that you  
16 think is -- needs to be revealed.

17           But I -- you know, you need to be -- I suspect Judge  
18 Oetken is not going to want to unnecessarily divulge per --  
19 you know, performance evaluations of particular people unless  
20 it's necessary to do so at this stage. So you should consider  
21 that. I'm not saying it's absolutely required, but it's  
22 something that should be considered.

23           All right. Having said all that, I'm going to hear  
24 from the defendants and then the plaintiffs.

25           MR. LUPION: Thank you, Your Honor. Just a couple

1 of preliminary points. Suffice it to say, we disagree with  
2 Mr. Murphy's characterization of what the evidence is, but  
3 we're not here to litigate that issue today.

4           As we said in our papers, what Your Honor proposed  
5 is exactly what we proposed during the meet-and-confer process  
6 that once plaintiff had an idea of which of the thousands of  
7 pages of deposition testimony and which of the tens of  
8 thousands of documents he intends to actually include with his  
9 filing that the parties can have a dialogue of what meets the  
10 sealing criteria.

11           I think defendants practice throughout the  
12 litigation reflects an understanding that simply because a  
13 document has been designated as confidential doesn't mean it's  
14 going to meet the sealing criteria. In fact, defendants have  
15 filed confidential documents on the public docket and  
16 plaintiff has on two separate occasions attempted to file  
17 under seal documents that defendants have designated as  
18 confidential at which point once was Your Honor, one was Judge  
19 Oetken invited defendants to make a sealing application and we  
20 declined because the documents -- we didn't believe the  
21 documents would meet the Lugosch standard.

22           Now, on the other hand, when defendants moved in  
23 connection with plaintiff's independent medical examination,  
24 there was sensitive information that we believed would be  
25 embarrassing to plaintiff and did meet the Lugosch criteria.

1 So before we actually filed that, we reached out to plaintiff,  
2 advised the plaintiff, these are the documents we intend to  
3 include with our application; do you consent to the sealing of  
4 this information. And not only did they consent to the  
5 sealing of that information, they actually thought that we  
6 were under-redacting. So we complied with their request and  
7 we made a joint request to seal that material that the Court  
8 granted. So I don't want there to be any impression out there  
9 that simply because a document has been designated as  
10 confidential that defendants believe it should be sealed.

11 So we would be receptive to a formal practice of the  
12 parties meeting and conferring X number of days before the  
13 filing of a motion to discuss the potential exhibits. And if  
14 we are unable to come to an agreement, then we could present  
15 the dispute to the Court at that time.

16 But to discuss sealing in the abstract now what's  
17 go -- what documents are going to meet the sealing criteria  
18 without any indication of what's actually going to be a  
19 judicial document is, we submit, entirely premature.

20 THE COURT: All right. Mr. Murphy, anything you  
21 want to add to what I said?

22 MR. MURPHY: Yes, Your Honor. With respect, I  
23 believe what you're proposing is shifting the burden and  
24 placing the burden on us when the burden is squarely on the  
25 defendants, especially at this stage --

1 THE COURT: I lost you.

2 MR. MURPHY: -- [indiscernible] --

3 THE COURT: You've going to have to explain that. I  
4 didn't think I put any burden on you other than saying what  
5 documents are at issue.

6 MR. MURPHY: Yes. But what -- what I would ask you  
7 to consider is that it should be coming the other way. The  
8 defendants should be coming to me and saying that we believe,  
9 Kevin, that these portions of the depositions and these  
10 particular documents we have most compelling reasons to keep  
11 these confidential and here's why. I think that's what --  
12 again, with respect, Your Honor, I think that's what the law  
13 says.

14 I think the burden is squarely on them, especially  
15 at this stage. It was true under the confidentiality order as  
16 well, but I didn't take it to you, I agree. But now it's far  
17 more of the burden on the defendant to be doing this and it  
18 just -- it -- I think the process that you are proposing  
19 places the burden on us when it should be on them.

20 THE COURT: Places the burden --

21 MR. MURPHY: So I would --

22 THE COURT: Places the burden to do what?

23 MR. MURPHY: -- ask you to consider --

24 THE COURT: I don't think you understand my propose  
25 otherwise you wouldn't be saying what I'm saying. What is it



1 you think I've placed the burden on you to do?

2 MR. MURPHY: That I should identify what documents  
3 and what deposition testimony that they have designated that I  
4 want to use.

5 THE COURT: That's correct. That --

6 MR. MURPHY: And in reality I think --

7 THE COURT: That's the only obligation I've put on  
8 you is just to identify the burden, the substantive burden  
9 under Lugosch rests entirely with them. So, yes, I've given  
10 you a responsibility, a duty. If you want to call it a  
11 burden, I suppose you could call it that, but it's not a  
12 burden in the sense of a burden of proof which is what Lugosch  
13 puts on the defendant for purposes of identifying a  
14 designation.

15 So anything on -- I mean, I just -- I honestly don't  
16 even understand what you're talking about, Mr. Murphy, so if  
17 you want to take another shot at it, go ahead.

18 MR. MURPHY: I will refrain.

19 THE COURT: Okay. So when do you think -- right now  
20 is there a deadline for summary judgment motions?

21 MR. LUPION: Your Honor, I believe that the  
22 deadline -- expert discovery is scheduled to close on  
23 March 2nd and under the prior scheduling order, summary  
24 judgment [indiscernible] would be due within 14 days of the  
25 close of expert discovery. So assuming the 14-day window,

1 that would be March 16th for summary judgment.

2 THE COURT: Okay. And was the plaintiff planning to  
3 move for summary judgment?

4 MR. MURPHY: Yes.

5 THE COURT: Okay. And defendant, do you plan to  
6 move for summary judgment?

7 MR. LUPION: Yes, Your Honor.

8 THE COURT: Okay.

9 MR. LUPION: Most definitely.

10 THE COURT: All right. So we have a little bit  
11 of -- by the way, when are -- who -- the expert designations  
12 relate to damages or liability or both or have they not  
13 happened yet?

14 MR. LUPION: They have not happened.

15 THE COURT: Okay. From -- let them ask each side.  
16 Defendants, are you going to hire any experts for your case in  
17 chief or it's just going to be in response to plaintiff's  
18 experts?

19 MR. LUPION: We haven't made that determination yet,  
20 Your Honor. That might depend in no insignificant measure on  
21 the proposed amended complaint. Plaintiff's motion for leave  
22 is currently --

23 THE COURT: Yes.

24 MR. LUPION: -- [indiscernible] before the Court.

25 THE COURT: I'll try to --

1           MR. LUPION: Even absent that amendment, we -- it's  
2 possible that we would have a liability expert that would  
3 testify on liability issues.

4           THE COURT: And how about from plaintiff's point of  
5 view, do you know yet?

6           MR. LUPION: In addition to damages.

7           THE COURT: Thank you. And from plaintiff's point  
8 of view?

9           MR. MURPHY: Yes, we will have an expert witness on  
10 liability.

11           THE COURT: Oh, okay. All right. So there's  
12 probably not a lot we can do before the expert discovery  
13 period is closed. So, you know, I -- my -- I'm not really  
14 forcing the parties to do this. It just seems insane not to,  
15 but the -- it just -- the plaintiff knows that they're going  
16 to be, you know, putting in, you know, an entire deposition of  
17 some person as an exhibit or any particular documents as far  
18 as part of their summary judgment motion. It's going to make  
19 life a lot easier if that can be resolved to the degree  
20 possible between the parties before the motion is filed. And  
21 I don't -- and I don't expect the parties to come to me about  
22 it.

23           My vision is plaintiff says, we're attaching  
24 documents 1 through 25 that you have designated as  
25 confidential. We expect to use them in the summary judgment

1 motion. Please let us know which ones you'll be making a  
2 Lugosch application on or parts of which ones so that we know  
3 what redactions you're seeking. That's it.

4 And then defendants will answer that within some  
5 reasonable period of time. And then the parties can file  
6 their summary judgment motions in accordance with Judge  
7 Oetken's rule with whatever redactions the defendants are  
8 sticking to at that point. And I will issue an order that  
9 says within some number of days so they'll have gotten a  
10 warning. It won't be a lot. You know, within seven days of  
11 that filing -- of any filing by the plaintiffs, they need to  
12 file the letter required by Judge Oetken that shows why the  
13 redaction meets their burden under Lugosch. So that's my plan  
14 right now and I don't want to set particular deadlines, you  
15 know, dates right now for doing it because I would just rather  
16 wait till a little bit closer. But that's the plan.

17 So I know parties have already expressed some  
18 disagreement about it, but in terms of the mechanics of the  
19 plan is there anything anyone wants to say, Mr. Lupion,  
20 starting with you?

21 MR. LUPION: Yes, Your Honor. Thank you. And I  
22 think it would be most constructive if we had the documents  
23 that they intend to file. We're not looking for -- to have it  
24 weeks or months in advance. We think, you know, a number of  
25 days, maybe within a week of the filing where it's in a decent

1 enough shape where they have a reasonable idea of what they  
2 are actually going to file, rather than the hypothetical idea,  
3 I think would be most constructive --

4 THE COURT: Just so it's clear, I don't want -- I  
5 want to try to have you make some decisions before they file  
6 the motion and the reason I want to do that is I would rather  
7 not have some blacked-out briefs filed before Judge Oetken if  
8 it turns out that you're going to be conceding on half the  
9 designations anyway that you can't meet the burden.

10 So I just want to make it clear. I want them to  
11 give you, you know, the list of documents. I want you to  
12 respond within seven days saying we're needing -- we're going  
13 to -- we believe we can meet our burden with respect to  
14 documents whatever numbers and then give them a few days so  
15 now know exactly what it is they have to redact. That's --  
16 did you understand that's what I was proposing?

17 MR. LUPION: Yes, that -- yes, Your Honor, we are on  
18 the same --

19 THE COURT: So the only -- the only time period  
20 that's at issue for you is once you get the list of documents  
21 1 through 25 or 1 through 100, I have no idea what it is, how  
22 much time are you going to need to make that decision?

23 MR. LUPION: I think a week should be more than  
24 enough. I'm hopeful to do it -- if it's a reasonable volume  
25 of documents to be included with a summary judgment filing,

1 assuming they're not attaching every single document that we  
2 produce then, you know, I think a couple of days should  
3 suffice --

4 THE COURT: Okay.

5 MR. LUPION: -- given the criteria that's going --  
6 that's going to apply.

7 THE COURT: Okay. Well, you know, I think a week  
8 makes sense and I think giving the plaintiff a week to  
9 actually do the redactions that they have to do once they hear  
10 what you're saying is redacted I think is more than enough.

11 But now let me just turn to Mr. Murphy if he had any  
12 comments on the mechanics.

13 MR. MURPHY: I don't want to be a Debbie Downer  
14 here, but what happens if I get the same response from the  
15 defendants that I have received previously, that is they're  
16 not going to relent on any of it or just a mere fraction of  
17 it.

18 THE COURT: Right. Well, that --

19 MR. MURPHY: That would keep pretty much in --

20 THE COURT: Then we have the Judge Oetken process,  
21 which I'm going to tweak only by requiring them to file the  
22 motion explaining the reasons that it meets Lugosch rather  
23 than you, obviously. And do it within -- if they'll have had,  
24 you know, a good deal of warning, at least a week, within a  
25 week of your filing.

1 MR. MURPHY: Very good. That was my hope, Your  
2 Honor. My hope was if Nick and I do this early on that we can  
3 hopefully resolve the entire issue, like you said, before the  
4 briefs are filed so that we don't have a situation where we  
5 have to file most of it under seal. If we can -- if -- if we  
6 can get that issue resolved before filing, that would be  
7 wonderful.

8 THE COURT: Right. Well, it's not going to be  
9 judicially resolved, but you will at least get some answers as  
10 to what they're really going to be making an application on.  
11 So that -- that you'll get.

12 Okay. I'm not going to issue a written order at  
13 this point but when we get closer someone should send me a  
14 letter that proposes the specific deadlines in relation to  
15 whatever the deadline is for the summary judgment motion and  
16 also includes the tweak, if you can remember this, that under  
17 Judge Oetken's practice -- let's see, number 2(e)(ii), that it  
18 is the obligation of the party making the designation to make  
19 the filing required by that paragraph to justify the filing  
20 under seal.

21 All right. Any questions before we finish,  
22 Mr. Lupion?

23 MR. LUPION: No, Your Honor. Thank you very much.

24 THE COURT: Okay. Mr. Murphy, anything?

25 MR. MURPHY: No, Your Honor, and thank you very much

1 for your time.

2 THE COURT: Okay. Thank you. Goodbye.

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1 I certify that the foregoing is a court transcript  
2 from an electronic sound recording of the proceedings in the  
3 above-entitled matter.

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6 Ruth Ann Hager, C.E.T.\*\*D-641

7 Dated: October 30, 2019  
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